89-528

No. ____

Supreme Court, U.S.
FILED
SEP 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STEPHEN TOWNE, Petitioner

v.

TOMLIN PROPERTIES, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Stephen Towne, Pro Se
651 Sheffield Drive
Richardson, Texas 75081
(817) 763-8711

Fletcher L. Yarbrough
Jeffrey S. Levinger
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000
Counsel for Respondents

36 pp

No. ___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STEPHEN TOWNE, Petitioner

v.

TOMLIN PROPERTIES, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Stephen Towne, Pro Se
651 Sheffield Drive
Richardson, Texas 75081
(817) 763-8711

Fletcher L. Yarbrough
Jeffrey S. Levinger
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000
Counsel for Respondents

QUESTIONS PRESENTED

1. Is a plaintiff in a civil RICO case required to allege and prove direct injury from all predicate acts (a minimum of two) constituting a "pattern of racketeering activity" and if not, does a plaintiff need to prove a direct causal relationship with any predicate acts and the plaintiff's damages, or is it sufficient to prove an indirect causal relationship to the defendant's "pattern of racketeering"?

2. In a civil RICO case, is evidence related to frauds perpetrated against victims unrelated to a plaintiff, relevant to and admissible in the plaintiff's case as proof of the scheme to defraud element of the predicate acts of mail and wire fraud and as proof of defendant's "pattern of racketeering activity" and if so, when do they become relevant?

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on both of the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Does a court of appeals abuse its discretion in making conclusions on the merits of an alleged RICO conspiracy stated under 18 U.S.C. § 1961 et seq and dismissing cause of action where pretrial discovery has not been completed?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Stephen Towne, and the respondents, Tomlin Properties, Tomlin Properties, Inc., D. O. Tomlin, Jr., Erline Tomlin and Kenneth Houston.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....2

STATUTE INVOLVED.....3

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....9

I. The Fifth Circuit Court of Appeals ruling presents an important new attempt to narrow the scope of civil RICO to less than that provided by RICO law itself and in contradiction to the spirit of previous U. S. Supreme Court rulings on RICO scope.....9

II. The decision below raises an important and unresolved question of when, in a civil RICO case, does

evidence of a defendant's racketeering activity against unrelated victims, become relevant to a plaintiff's case.....13

III. The ruling below creates an unresolved conflict between the Seventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals as to whether a civil RICO plaintiff must prove direct damage from at least two predicate acts making up the "pattern of racketeering".....17

CONCLUSION.....19

APPENDIX (Opinion and Judgment of Court of Appeals, and Order of the Magistrate)....1a

TABLE OF AUTHORITIES

Cases:

Marshall & Illsley Trust v. Pate, 819 F2d 806 at 810 (7th Cir 1987).....17

Minpeco S. A. v. Conticommodity Services, Inc., et al, 673 F.Supp. 684 (S.D.N.Y) 1987.....11

United States v. Elliott 571 F2d. 880 at at 882 (5th Cir. 1978).....12, 15

United States v. Turkette 452 U.S. 576 at 587.....9

Statutes:

Organized Crime Control Act of 1970 P.L. 91-451, §902(a), 84 Stat. 947 (1970).....9

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-68...6, 9

Rules:

Federal Rules of Civil Procedure (Rule 41b).....7, 14

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

STEPHEN TOWNE, Petitioner

v.

TOMLIN PROPERTIES, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Stephen Towne respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 29, 1989.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals has not been reported and is reprinted in the appendix hereto, p. 3a.

Magistrate John B. Tolle's order dated December 21, 1987 is reprinted in the appendix hereto, p. 1a.

JURISDICTION

Invoking federal jurisdiction under 18 U.S.C. §1964, the petitioner brought the suit in the Northern District of Texas. On December 21, 1987 the Northern District denied the petitioner's motion to compel production of documents. On January 27, 1988 the Northern District considered the petitioner's notice of appeal and application for review of the order of the Magistrate and affirmed the Magistrate's order.

On December 28, 1988 the Northern District entered a judgment against the petitioner ordering that he take nothing against the respondents.

On petitioner's appeal, the Fifth Circuit on June 29, 1989 entered a judgment affirming the Northern District's judgment. See p. 3a. No petition for rehearing was sought.

STATUTE INVOLVED

28 U.S.C. §1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Petitioner has been a real estate investor for 15 years. In 1983, he invested in a land joint venture with the respondents as manager of the joint venture. The decision to invest was made after examining the subject property, talking to the respondents at length, reviewing a sales circular prepared by the respondents on the subject property and reviewing the respondent's written track record as prepared by them. The sales circular contained certain statements regarding the respondent's commitment to the investing joint venturees.

In late 1986, the petitioner became aware of the alleged scheme by the respondents to hold the joint venture property off the market for the exclusive benefit of themselves and to the detriment of the investing joint venturees. Various actions were taken by the respondents to prevent any sale to an arm's length buyer. The alleged ultimate goal of the respondents was to acquire full

control of the property themselves through defaults by the investing joint venturees or via a bargain purchase. This action was against the wishes and instructions of the investing joint venturees. The petitioner, as well as other investing joint venturees, ultimately suffered substantial financial losses as a result of these actions.

In the pre-litigation investigation done by the petitioner, various alleged identical frauds were uncovered against other investing joint venturees in other joint ventures. Many of these alleged frauds had gone full circle, with investing joint venturees having been relieved of their investments by the respondents at distress sale prices. The respondents allegedly then turned around and resold the property at full market value, pocketing the difference. In the course of this pre-litigation investigation, substantial alleged misrepresentations were also uncovered in the respondents' written track records.

On April 14, 1987, the petitioner filed suit against the respondents under 18 U.S.C. §1961 et seq, Racketeers Influenced Corrupt Organizations Act, alleging predicate acts of mail and wire fraud among other things.

As part of the discovery process, the petitioner requested documents related to these alleged frauds perpetrated against unrelated investors. The respondents refused to voluntarily turn these documents over arguing, among other things, that they were irrelevant to the petitioner's case. In November, 1987, the petitioner filed a Motion to Compel Production of Documents. On December 21, 1987, U. S. Magistrate John Tolle denied the petitioner's motion. In writing his opinion, Magistrate Tolle stated that documents related to these transactions in which the plaintiff did not have standing were not admissible as evidence in a plaintiff's case.

This ruling effectively precluded the petitioner from not only accessing evidence available only to the respondents on these

other alleged frauds, but precluded the petitioner from introducing substantial incriminating evidence that he already had on these other alleged frauds.

On January 27, 1988, U. S. District Judge Sam Cummings denied petitioner's notice of appeal and application for review of the Order of the Magistrate.

At this point the discovery issue became interlocutory. Because the petitioner was now precluded from proving the pattern of racketeering element under RICO and the scheme to defraud element of mail and wire fraud predicate act, the petitioner elected to go to district court for the sole purpose of setting up an appeal on the interlocutory discovery issue. On December 5, 1988, the case was heard by Judge Cummings. Documents were introduced, but no testimony was given in an effort to mitigate exposure to Federal Rule of Civil Proc. §41(b) sanctions.

On June 29, 1987 the Fifth Circuit Court of Appeals ruled that U. S. Magistrate Tolle's December 21, 1987 ruling had been in error, but that the error was harmless to the petitioner's case. The Court of Appeals reasoned that although the petitioner had been precluded from using predicate acts perpetrated against unrelated victims in the petitioner's pattern of racketeering requirement, he had not been precluded from proving a pattern of racketeering based solely on predicate acts (as few as two) having a direct causal relationship with the petitioner's damages. They also stated that the plaintiff produced no evidence tending to show that the defendants committed any predicate acts or other actionable wrong in relation to the plaintiff's joint venture.

REASONS FOR GRANTING THE WRIT

I

The Fifth Circuit Court of Appeals ruling presents an important new attempt to narrow the scope of civil RICO to less than that provided by RICO law itself and in contradiction to the spirit of previous rulings by this Court on RICO scope.

According to 18 U.S.C. §1964(c),

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

The Organized Crime Control Act of 1970, within which RICO became law, included §902 (a) (referred to in various literature as the "liberal construction clause") that said RICO should be liberally construed to effectuate its remedial purposes.

Per United States v. Turkette, 452 U.S. 576 at 587, this Court stated that if the law is unambiguous and contrary to clearly

expressed legislative intent, the language must be regarded as conclusive. Hence, it is not for the judiciary to narrow the scope of RICO to less than the law allows.

Although the Fifth Circuit Court of Appeals ruled that U. S. Magistrate Tolle's discovery ruling of December 21, 1987 was in error, they ruled that the error was harmless because it did not preclude the petitioner from establishing a pattern of racketeering based solely on predicate acts (as few as two) having a direct causal relationship with the petitioner's damages.

While the point is well taken by the petitioner that a plaintiff does not have to establish a pattern of racketeering with multiple victims, it is also true based upon a literal reading of the law, that a RICO action can be sustained by establishing a pattern of racketeering with multiple victims, where no one victim can establish a causal relationship with more than one predicate act. Or where a victim can establish a

defendant's pattern of racketeering with multiple victims, and then establish an indirect causal relationship between his damages and the racketeering activity. A good example of this type of case is Minpeco S.A. v. Conticommodity Services, Inc. et al, 673 F.Supp. 684 (S.D.N.Y, 1987) where Minpeco was merely a participant in the silver market when the Hunts were attempting to corner it. The Hunts did not have any dealings with Minpeco directly. Minpeco was damaged indirectly through being a player in the silver market which the Hunts were manipulating. The Hunt's racketeering activity consisted of their actions to manipulate the silver market. It did not stem from predicate acts consummated by the Hunts specifically against Minpeco or with Minpeco in mind.

By ruling that petitioner was not damaged by the erroneous ruling, the Fifth Circuit Court of Appeals in effect ruled that petitioner was required to establish a pattern of racketeering based solely on any

predicate acts in which the petitioner could establish a direct causal link to his damages. Since RICO law says there must be a minimum of two predicate acts to establish a pattern of racketeering, the ruling means that the petitioner had to establish a minimum of two predicate acts directly harming him to sustain his RICO case. This is a judicial narrowing of the scope of RICO law as it applies to civil claims.

In the petitioner's specific case, mail and wire fraud were alleged as predicate acts. Case law is well established that the only elements of mail and wire fraud are the use of the U. S. mails or the use of interstate telephone or telegraph lines and a scheme to defraud. Proof of a scheme to defraud involved proof of criminal intent as opposed to mistaken judgment. Case law is also well established that circumstantial evidence can be used to establish this criminal intent. United States v. Elliott 571 F2d 880 at 882 (5th Cir 1978).

By ruling that the preclusion of evidence in the petitioner's case was a harmless error, the Fifth Circuit Court of Appeals held that the scheme to defraud element of the alleged mail and wire fraud had to be proven solely on evidence of actions directed against the petitioner. Criminal intent is difficult to prove in the best of circumstances, but a limitation of evidence to actions directed solely to the RICO plaintiff creates an almost insurmountable problem in proving the predicate acts of mail or wire fraud in a civil RICO action. This limitation on the use of mail or wire fraud in a civil RICO case is a further judicial narrowing of the scope of RICO law.

II

The decision below raises an important and unresolved question of when, in a civil RICO case, does evidence of a defendant's racketeering activity against unrelated victims, become relevant to a plaintiff's case.

The Fifth Circuit Court of Appeals held that Magistrate Tolle's ruling was in error, but that it did not result in a reversible error. The opinion further states that the petitioner produced no evidence tending to show that the respondents committed any predicate act or other actionable wrong in relation to the petitioner's joint venture. As set forth in the Statement of the Case above, the petitioner did not introduce any testimony developing the scheme to defraud evidence in an effort to mitigate Federal Rule of Civil Proc. §41(b) sanction exposure.

The gravamen of a mail fraud violation/ predicate act is the mailing of an item through the U. S. mails as part of a scheme to defraud. However, to introduce evidence that erroneous items were mailed means nothing without the ability to prove the scheme to defraud which includes proof of criminal intent. As noted above in United States v. Elliott 571 F2d, 880 at 882 (5th Circuit 1978), the more times a suspect action has been repeated, the more reasonable the assumption of criminal intent. Actions by the respondents to prevent sales to arm's length buyers can be dismissed as mistakes in judgments until these actions are viewed in the context of many identical alleged frauds which have gone full circle.

The Fifth Circuit Court of Appeals ruling states that evidence related to frauds perpetrated against unrelated victims is relevant, but apparently, only after the petitioner has established a requisite number of predicate acts and has established the causal relationship of his damages to those predicate acts.

III

The ruling below creates an unresolved conflict between the Seventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals as to whether a civil RICO plaintiff must prove direct damage from at least two predicate acts making up the "pattern of racketeering".

The Seventh Circuit Court of Appeals ruled in Marshall & Ilsley Trust v. Pate, 819 F.2d 806 at 810 (7th Cir 1987) that a plaintiff does not need to have been damaged by two or more predicate acts making up the pattern of racketeering.

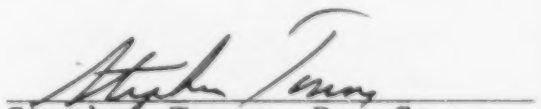
While the ruling below agrees in theory with this principle, in practice it contradicts the principle. The Court of Appeals states that the district court ruling deprived the petitioner of proving a pattern of racketeering using multiple victims. The Court of Appeals, however, did not grant any

relief from this error. That left the petitioner with but one way to prove a pattern of racketeering. That one way was to prove multiple predicate acts (a minimum of two) damaging one victim (the petitioner). Therein lies the contradiction with the Seventh Circuit.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 3 is presented herein, not as a reason for granting certiorari, but because in the posture of this case this is the only opportunity for petitioner to seek review of the ultimate ruling of the Fifth Circuit that petitioner's § 1961 complaint should be dismissed under Rule 41(b). If the petitioner is correct in urging that his rights were substantially prejudiced by the preclusion of evidence related to frauds perpetrated against unrelated victims, the matter should be remanded to District Court for appropriate disposition, after a full development of the facts concerning the conspiracy.

Respectfully submitted,



Stephen Towne, Pro Se
651 Sheffield Drive
Richardson, Texas 75081
(817) 763-8711

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN TOWNE and LISANDRO MONTANARO	§	
	§	
VS.	§	CIVIL NO. CA 3-87-1026-G
	§	
TOMLIN PROPERTIES, ET AL	§	

ORDER

Under authority of 28 U.S.C §636(b) and the Local Rules of this Court, plaintiffs' motion to compel production of documents, filed November 6, 1987, was referred to the Magistrate for hearing and determination. A hearing was held on December 18, 1987 and counsel for all parties were present. And having reviewed the said motion, as well as the response thereto, and having heard the arguments of counsel.

IT IS THEREFORE ORDERED that plaintiffs' motion to compel production of documents be, and the same is, hereby denied. Even as narrowed by plaintiffs at the hearing, their document requests seek documents which would not

be admissible as evidence, and which would not reasonably lead to the discovery of admissible evidence if produced. The documents sought concern transactions between defendants and other persons or entities unrelated to any plaintiff, and no plaintiff has standing to assert any claims against defendants which may arise out of those transactions. It appears from the representations of counsel that defendants have produced documents for plaintiffs concerning all transactions which arguably have given rise to plaintiffs' cause of action against defendants.

All relief not expressly granted herein is denied. SIGNED this 21st day of December, 1987.

UNITED STATES MAGISTRATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1054
Summary Calendar

Stephen TOWNE,
Plaintiff-Appellant,

versus

TOMLIN Properties, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
CA-3-87-1026-C

(June 29, 1989)

Before, GEE, WILLIAMS, AND GARWOOD, Circuit Judges.

GEE, Circuit Judge:*

The plaintiff, Stephen Towne, brought suit against the defendant, Tomlin Properties, alleging violations of RICO, (18 U.S.C. §

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

1961), common law fraud, and breach of fiduciary duty in connection with his investment in a joint venture. The venture held undeveloped land that had been acquired and maintained by the defendant. After filing suit the plaintiff sought production of all documents relating to the joint venture at issue in the case Frisco 124 Venture. In addition the plaintiff sought discovery of all documents relating to approximately 100 other joint ventures created or participated in by the defendants over a twelve year period. The defendant produced the documents relating to the Frisco 124 Venture, but resisted production of documents related to other ventures on the grounds of privilege, irrelevance and burden.

The plaintiff then moved to compel production of the requested documents. The parties briefed the issues and the plaintiff agreed to narrow his request but still sought some documents related to approximately 100 joint ventures created by or participated in by the

defendant. A hearing on the plaintiff's motion to compel production was held before a magistrate. The magistrate noted that the plaintiff lacked standing to assert claims arising from any transaction except the Frisco 124 Venture and therefore held that the discovery sought by the plaintiff did not seek information that would reasonably lead to the discovery of admissible evidence. Consequently, the magistrate denied the plaintiff's motion. The plaintiff appealed to the district court which affirmed the magistrate's ruling.

The case same to trial approximately eleven months after the district court denied the plaintiff's motion to compel production. During that time the plaintiff conducted no further discovery. At trial no witnesses were called and no testimony was given. The plaintiff's entire case consisted of exhibits 1-62 which were offered into evidence. The district court sustained the defendant's objections to half of these exhibits. The district

court also granted the defendant's rule 41(b) motion to dismiss and entered a take nothing judgment against the plaintiff.

On appeal the plaintiff contends that the district court erred in denying his motion to compel production. "A trial court may exercise its discretion in allowing discovery under Rule 33, and in the absence of a ruling which results in substantial prejudice to the rights of the parties there is no abuse of discretion." Huff v. N. D. Cass Company of Alabama, 468 F.2d 172 (5th Cir. 1972). We must, therefore, first determine whether the district court's ruling that the plaintiff was not entitled to the discovery he sought was correct. If that ruling was incorrect, we must then determine whether it resulted in a substantial prejudice to the plaintiff's rights.

The district denied the plaintiff's motion to compel production on the grounds that the plaintiff had no standing to assert any claims against the defendants which arose

from transactions other than the Frisco 124 Venture. The district court therefore concluded that documents unrelated to the Frisco 124 Venture would not reasonably lead to the discovery of admissible evidence. Consequently, the district court concluded these documents were not subject to discovery.

The plaintiff contends that the information he sought would have been admissible to show that the defendant had engaged in a pattern of racketeering. In support of this contention the plaintiff cites Marshall & Ilsley Trust v. Pate, 819 F.2d 806 (7th Cir. 1987). In Marshall the Seventh Circuit vacated a district court order dismissing a plaintiff's RICO claims on the grounds that the plaintiff had failed to show that the two predicate acts constituting a pattern of racketeering activity had harmed the plaintiff. In vacating this order the Seventh Circuit stated "[P]erpetration of fraudulent activities on more than one victim, while following the same modus

operandi, is indeed a 'pattern' for RICO purposes...." Id. at 810 (citations omitted). Like the Seventh Circuit "We cannot approve the district court's holding that a plaintiff must show that '[t]he two predicate acts necessary to state a RICO violation must have harmed the plaintiff.'" Id. at 810. Consequently, we hold that the district court erred in determining that the material sought was not discoverable. The issue remains, however, of whether this error resulted in substantial prejudice to the plaintiff.

The plaintiff contends that his "case was substantially prejudiced because without being able to access and introduce critical documents, he could not prove the pattern of racketeering." The flaw in this argument is that it assumes that a pattern of racketeering may be proven only by showing that the defendant has engaged in fraudulent activities which have harmed more than one victim. Such is not the case. We have held, for example, that two predicate acts arising from a single business

transaction may be used to show a pattern of racketeering. See R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985). The district court's ruling deprived the plaintiff of one method of proving that the defendant engaged in a pattern of racketeering. The ruling did not, however, deprive the plaintiff of the opportunity to show a pattern of racketeering by reference to acts occurring in relation to the Frisco 124 Venture. Moreover, the plaintiff produced no evidence tending to show that the defendants committed any predicate act or other actionable wrong in relation to the Frisco 124 Venture; in these circumstances, exclusion of discovery of wrongs by the defendants in respect to other transactions not involving plaintiff or the Frisco 124 Venture was not substantially prejudicial to plaintiff. Consequently, the court's ruling did not substantially prejudice the plaintiff's rights. The judgment of the district court is, therefore,

AFFIRMED.